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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

6
7 TIMOTHY E. WEBB,

8 Plaintiff,

9 vs.

10 ROMEO ARANAS et al.,

11 Defendants.
12

3:17-cv-00427-RCJ-CBC

ORDER

13 This is a prisoner civil rights complaint pursuant to 42 U.S.C. § 1983. The Court now
14 screens the Complaint under 28 U.S.C. § 1915A.

15 **I. FACTS AND PROCEDURAL HISTORY**

16 Plaintiff Timothy Webb is a prisoner in the custody of the Nevada Department of
17 Corrections. He alleged constitutional violations against various Defendants arising out of
18 events at Warm Springs Correctional Center. He alleges deliberate indifference under the Eighth
19 Amendment against several Defendants based on their refusal to treat his Hepatitis C Virus
20 (“HCV”) beyond monitoring it.

21 **II. LEGAL STANDARDS**

22 Federal courts must screen any case in which a prisoner seeks redress from a
23 governmental entity or its officers or employees. 28 U.S.C. § 1915A(a). The court must identify
24 cognizable claims and dismiss claims that are frivolous, malicious, fail to state a claim, or seek

1 monetary relief from an immune defendant. *See* 28 U.S.C. § 1915A(b). This includes claims
2 based on fantastic or delusional scenarios. *Neitzke v. Williams*, 490 U.S. 319, 327–28 (1989).
3 Also, when a prisoner seeks to proceed without prepayment of fees, a court must dismiss if “the
4 allegation of poverty is untrue.” 28 U.S.C. § 1915(e)(2)(A).

5 When screening claims for failure to state a claim, a court uses the same standards as
6 under Rule 12(b)(6). *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 2012). Federal Rule of
7 Civil Procedure 8(a)(2) requires “a short and plain statement of the claim showing that the
8 pleader is entitled to relief” in order to “give the defendant fair notice of what the . . . claim is
9 and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47 (1957). A motion to
10 dismiss under Rule 12(b)(6) tests the complaint’s sufficiency, *see N. Star Int’l v. Ariz. Corp.*
11 *Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983), and dismissal is appropriate only when the
12 complaint does not give the defendant fair notice of a legally cognizable claim and the grounds
13 on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

14 A court treats factual allegations as true and construes them in the light most favorable to
15 the plaintiff, *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986), but does not accept as
16 true “legal conclusions . . . cast in the form of factual allegations.” *Paulsen v. CNF Inc.*, 559 F.3d
17 1061, 1071 (9th Cir. 2009). A plaintiff must plead facts pertaining to his case making a violation
18 “plausible,” not just “possible.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79 (2009) (citing *Twombly*,
19 550 U.S. at 556) (“A claim has facial plausibility when the plaintiff pleads factual content that
20 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
21 alleged.”). That is, a plaintiff must not only specify or imply a cognizable legal theory (*Conley*
22 review), he must also allege the facts of his case so that the court can determine whether he has
23 any basis for relief under the legal theory he has specified or implied, assuming the facts are as
24 he alleges (*Twombly-Iqbal* review).

1 “Generally, a district court may not consider any material beyond the pleadings in ruling
2 on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the
3 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner*
4 *& Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted). Similarly, “documents
5 whose contents are alleged in a complaint and whose authenticity no party questions, but which
6 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
7 motion to dismiss” without converting the motion to dismiss into a motion for summary
8 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Also, under Federal Rule
9 of Evidence 201, a court may take judicial notice of “matters of public record” if not “subject to
10 reasonable dispute.” *United States v. Corinthian Colls.*, 655 F.3d 984, 999 (9th Cir. 2011).
11 Otherwise, if the district court considers materials outside of the pleadings, the motion to dismiss
12 is converted into a motion for summary judgment. *See Arpin v. Santa Clara Valley Transp.*
13 *Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

14 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege (1) violation of a right
15 secured by the Constitution or laws of the United States (2) by a person acting under color of
16 state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

17 **III. ANALYSIS**

18 A prisoner can establish an Eighth Amendment violation arising from deficient medical
19 care if he can prove that prison officials were deliberately indifferent to a serious medical need.
20 *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Assuming the medical need is “serious,” a plaintiff
21 must show that the defendant acted with deliberate indifference to that need. *Id.* “Deliberate
22 indifference is a high legal standard.” *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004). It
23 entails something more than medical malpractice or even gross negligence. *Id.* Deliberate
24 indifference exists when a prison official “knows of and disregards an excessive risk to inmate

1 health or safety; the official must both be aware of the facts from which the inference could be
2 drawn that a substantial risk of serious harm exists, and he must also draw the inference.”

3 *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Deliberate indifference exists when a prison
4 official “den[ies], delay[s] or intentionally interfere[s] with medical treatment, or it may be
5 shown by the way in which prison officials provide medical care.” *Crowley v. Bannister*, 734
6 F.3d 967, 978 (9th Cir. 2013) (internal quotation marks and citation omitted).

7 Critically, “a difference of opinion between a physician and the prisoner—or between
8 medical professionals—concerning what medical care is appropriate does not amount to
9 deliberate indifference.” *Snow v. McDaniel*, 681 F.3d 978, 987 (9th Cir. 2012) (citing *Sanchez v.*
10 *Vild*, 891 F.2d 240, 242 (9th Cir. 1989), *overruled on other grounds by Peralta v. Dillard*, 744
11 F.3d 1076, 1083 (9th Cir. 2014). Instead, to establish deliberate indifference in the context of a
12 difference of opinion between a physician and the prisoner or between medical providers, the
13 prisoner “‘must show that the course of treatment the doctors chose was medically unacceptable
14 under the circumstances’ and that the defendants ‘chose this course in conscious disregard of an
15 excessive risk to plaintiff’s health.’” *Id.* at 988 (quoting *Jackson v. McIntosh*, 90 F.3d 330, 332
16 (9th Cir. 1996)). In other words, where there has been some arguably appropriate treatment,
17 deliberate indifference cannot be established merely by showing disagreement with the physician
18 but only by showing that the defendant chose a course of treatment knowing that it was
19 inappropriate. Put differently, a court cannot substitute its judgment for that of a medical
20 professional, but it can examine a medical professional’s good faith in selecting a course of
21 treatment.

22 A “blanket” policy of non-treatment for a given condition can constitute deliberate
23 indifference where the policy is applied to supersede contrary medical indications. *Colwell v.*
24 *Bannister*, 763 F.3d 1060, 1068 (9th Cir. 2014) (“[Plaintiff] was denied treatment for his

1 monocular blindness solely because of an administrative policy, *even in the face of medical*
2 *recommendations to the contrary*. A reasonable jury could find that Colwell was denied surgery,
3 not because it wasn't medically indicated, not because his condition was misdiagnosed, not
4 because the surgery wouldn't have helped him, but because the policy of the NDOC is to require
5 an inmate to endure reversible blindness in one eye if he can still see out of the other. This is the
6 very definition of deliberate indifference.” (emphasis added)).

7 Here, the policy at issue is not alleged to be contrary to medical recommendations; rather,
8 the policy is itself a medical treatment standard. Plaintiff alleges no application of a policy of
9 non-treatment for HCV despite medical recommendations to the contrary in his case, as in
10 *Colwell*. Rather, he alleges application of a policy of non-treatment for his HCV because his
11 AST Platelet Ratio Index (“APRI”) score was under 2.0, i.e., the application of a medical
12 standard with which he simply disagrees. Permitting Plaintiff to attack that medical standard as
13 inappropriate under the guise of deliberate indifference would be to impermissibly
14 constitutionalize a medical negligence claim. Such a rule would make all “blanket” treatment
15 standards that medical professionals rely on suspect under the Eighth Amendment. Plaintiff does
16 not allege, as in *Colwell*, that any Defendant opined that treatment was medically necessary to
17 prevent objectively serious harm yet refused to treat him based on the APRI score policy.

18 Plaintiff argues in the Complaint that an increased APRI score must reflect increased
19 liver damage, even if it does not yet rise to 2.0, and that failure to treat his HCV where his APRI
20 score has risen (from 0.49 in July 2016 to 0.75 in May 2017) is therefore deliberate indifference.
21 But the claim that an increased APRI score necessarily indicates interim or imminent liver
22 damage is an unjustified assumption. The APRI score is a numerical diagnostic tool based on
23 laboratory tests. Neither Plaintiff nor the Court are experts qualified to opine on the medical
24 significance of an APRI score. The courts to address APRI scores in the context of deliberate

1 indifference claims based on non-treatment of HCV have nearly all ruled that there is no
2 subjective indifference in the sense of the Eighth Amendment so long as whatever treatment
3 guidelines an institution has established based on APRI scores are followed and a patient with
4 HCV is at least further monitored. *Dawson v. Archambeau*, No. 16-cv-489, 2018 WL 1566833,
5 at *2, 8, 11 & n.11 (D. Colo. Mar. 30, 2018); *Roy v. Lawson*, No. 2:17-cv-9, 2018 WL 1054198,
6 at *3–4, 7 (S.D. Tex. Feb. 26, 2018); *Walton v. Person*, No. 1:16-cv-157, 2017 WL 2807326, at
7 *5–6 (S.D. Ind. June 28, 2017); *Gordon v. Schilling*, No. 7:15-cv-95, 2016 WL 4768846, at *4, 6
8 & n.4 (W.D. Va. Sept. 13, 2016); *Melendez v. Fla. Dep’t of Corr.*, No. 3:15cv450, 2016 WL
9 5539781, *3, 6–7 (N.D. Fla. Aug. 30, 2016). *But see Postawko v. Mo. Dep’t of Cor.*, No. 2:16-
10 cv-4219, 2017 WL 1968317 (W.D. Mo. May 11, 2017). Plaintiff does not allege his HCV was
11 not monitored or that his APRI score at some point exceeded 2.0 but Defendants still refused to
12 treat him in contradiction of their own guidelines. Rather, he demands a particular treatment
13 based on his opinion of the significance of his APRI scores. The Court may not in the context of
14 an Eighth Amendment claim substitute Plaintiff’s or the Court’s opinions for those of
15 Defendants’ as to whether continued monitoring versus treatment, e.g., with drugs or surgery,
16 was more appropriate.

17 The Court therefore dismisses the Complaint, with leave to amend. An amended
18 complaint supersedes (replaces) the original Complaint, so an amended complaint must be
19 complete in itself. *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542,
20 1546 (9th Cir. 1989); *see also Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012).
21 Plaintiff must file the amended complaint on this Court’s approved prisoner civil rights form and
22 it must be entitled “First Amended Complaint.” Plaintiff must file the amended complaint within
23 twenty-eight (28) days from the date of this Order, or the Court may dismiss with prejudice
24 without further notice.

1 **CONCLUSION**

2 IT IS HEREBY ORDERED that a decision on the Application to Proceed in Forma
3 Pauperis (ECF No. 1) is DEFERRED.

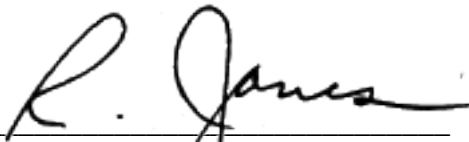
4 IT IS FURTHER ORDERED that the Clerk shall file the Complaint (ECF No. 1-1).

5 IT IS FURTHER ORDERED that the Complaint is DISMISSED, with leave to amend
6 within twenty-eight (28) days of this Order.

7 IT IS FURTHER ORDERED that the Clerk shall send Plaintiff the approved form for
8 filing a § 1983 complaint, instructions, and a copy of the Complaint (ECF No. 1-1). Plaintiff
9 must use the approved form and write the words “First Amended” above the words “Civil Rights
10 Complaint” in the caption. The Court will screen the amended complaint in a separate screening
11 order, which may take several months. If Plaintiff does not timely file an amended complaint,
12 the Court may dismiss with prejudice without further notice.

13 IT IS SO ORDERED.

14 DATED: This 6th day of November, 2018.

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17 ROBERT C. JONES
18 United States District Judge
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